

Supreme Court No. 94653-1
Court of Appeals No. 75632-0-I

**Supreme Court
of the State of Washington**

Patrick Cuzdey,

Petitioner/Appellant,

v.

Patricia Landes, et al.,

Respondents.

Reply to Answer to Petition for Review

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1. Identity of Petitioner

Patrick Cuzdey, Plaintiff in the trial court and Appellant in the Court of Appeals, replies to the new issues raised in Respondent's Answer.

2. New Issues Presented for Review

Cuzdey's Petition presented one issue for this Court's review: Did the trial court err in dismissing Cuzdey's claims despite genuine issues of material fact relating to the statute of frauds and doctrine of part performance? The Court of Appeals was presented with many other issues to review, but declined to address them. Cuzdey asks this Court to accept review and reverse on the one issue he presented and then remand to the Court of Appeals to review in the first instance the remaining issues relating to Cuzdey's claim to the real property.

Landes' Answer asks this Court to address those issues in the first instance, without the benefit of a Court of Appeals decision to review. Landes identifies those issues as: 1) the Deadman's Statute, 2) other evidentiary objections, 3) statute of limitations, 4) laches, and 5) estoppel. Landes further asks this Court to review the decisions of the Court of Appeals regarding 6) the Nova mobile home, 7) whether Cuzdey's quiet title action was frivolous in its entirety, and 8) attorney's fees on appeal. This Reply will address each in turn.

3. Argument

This Court's focus is not on correcting error, but on clarifying points of law. This Court can most efficiently serve that function when the Court of Appeals has already addressed an issue. This process allows the issues before this Court to be more focused and the briefing more developed. This Court should not waste its time addressing a multiplicity of issues that have not been vetted by the Court of Appeals.

As to those issues the Court of Appeals **did** decide, the court did not err or abuse its discretion. Landes has also failed to show that any alleged error meets the criteria for review by this Court of the decision of the Court of Appeals on those issues. On those issues, the decision of the Court of Appeals does not conflict with published precedent, does not present significant constitutional questions, and is not of substantial public interest. This Court should deny review of the additional issues presented by Landes.

If the Court grants Cuzdey's petition, Cuzdey asks that the Court clearly identify the issues accepted for review, to enable the parties to appropriately focus their supplemental briefing.

3.1 The Deadman's Statute

The trial court's dismissal of Cuzdey's claims was based in part on the Deadman's Statute. However, the trial court did not explain the basis of its application of the statute or what evidence was being excluded because of it. *See* RP June 19, 2015, at 64-65. Although the parties briefed the issue for the Court of Appeals, *e.g.*, Br. of App. at 11-17, the Court of Appeals declined to address the issue, deciding the case on the basis of the statute of frauds and the doctrine of part performance—the issue for which Cuzdey seeks this Court's review. On the issue of the Deadman's Statute, this Court does not have the benefit of a Court of Appeals decision to focus the discussion.

Cuzdey argued that Landes had waived the protections of the Deadman's Statute by testifying about the transaction. Landes argues that she did not waive the statute because her declaration was withdrawn when the summary judgment motion was amended. But what Landes fails to mention is that in both of her amended motions, she testified at length about the transaction in her Statements of Facts. CP 86-88, 397-404.

Both Statements of Facts went far beyond the evidence in the attached documents to provide additional, extrinsic allegations seeking to convince the court that there was never any agreement with Cuzdey in regards to the land. *See* Br. of App. at 15-16. That this additional testimony came through the

voice of counsel does not change the fact that Landes was making material, testimonial statements to the trial court about the transaction. *See* Reply Br. of App. at 22-23. Landes cannot be allowed to do indirectly through counsel what she cannot do directly, without facing the consequences: these testimonial statements about the transaction waived the Deadman's Statute and opened the door for rebuttal through Cuzdey's testimony.

The trial court erred in applying the Deadman's Statute. The Court of Appeals declined to address the issue. This Court has discretion to consider the issue, but should decline to do so in the absence of a Court of Appeals decision to focus the issue and the parties' arguments.

3.2 Other evidentiary objections

The trial court never expressly ruled on any of Landes' other evidentiary objections. *See* RP June 19, 2015, at 62-70. Thus there is no decision to review. Moreover, Landes has failed to develop any substantive argument to back up her objections. *See* Br. of Resp. at 48. She identified some objections by name but did not provide any authority or argument to support her position. *See Id.* (listing numerous objections but quoting authority only on hearsay and making no argument as to how that authority would apply to the statements in Jacob Cuzdey's

declaration).¹ Landes has waived the opportunity to have her objections reviewed. RAP 12.1(a); *State v. Mayes*, 20 Wn. App. 184, 194, 579 P.2d 999 (1978). Due to the lack of any trial court decision and the lack of substantive argument, the issue of Landes' other evidentiary objections is not ripe for review by this Court. This Court should decline to review this issue.

3.3 Statute of Limitations

The trial court cited the statute of limitations as an alternative grounds for dismissal. However, the trial court did not explain the basis of its application of the statute. *See* RP June 19, 2015, at 65. Although the parties briefed the issue for the Court of Appeals, *e.g.*, Reply Br. of App. at 9-14, the Court of Appeals declined to address it. On the issue of the statute of limitations, this Court does not have the benefit of the analysis of any lower court to focus the discussion.

Cuzdey argued that no statute of limitations applies to a quiet title action. Br. of App. at 20-21. Landes argues that Cuzdey's action was really one for fraud and was therefore barred by the statute of limitations. Ans. to Petition at 17. But binding precedent holds that an action to clear a cloud to title is

¹ It is also of note that Landes' objections apply only to Jacob Cuzdey's declaration, not to the more extensive and detailed declaration of Patrick Cuzdey, the named party. *See* Br. of Resp. at 47-50.

not subject to any statute of limitations, “even though fraud is practiced in creating the cloud.” *Petersen v. Schafer*, 42 Wn. App. 281, 284, 709 P.2d 813 (1985). Even if an “underlying” statute of limitations could apply, there was no breach of contract—or the fraud was not revealed—until Landes attempted to evict Cuzdey in 2014, after which he immediately and timely brought this action. *See* Reply Br. of App. at 12-14.

The trial court erred in holding that the statute of limitations could be an alternate grounds for dismissal. The Court of Appeals declined to address the issue. This Court has discretion to consider the issue, but should decline to do so in the absence of a Court of Appeals decision to focus the issue and the parties’ arguments.

3.4 Laches

The trial court cited the doctrine of laches as an alternative grounds for dismissal. However, the trial court did not explain the basis for this comment. *See* RP June 19, 2015, at 65. Although the parties briefed the issue for the Court of Appeals, *e.g.*, Reply Br. of App. at 4-6, the Court of Appeals declined to address it. On the issue of laches, this Court does not have the benefit of the analysis of any lower court to focus the discussion.

Cuzdey brought this action immediately after he became aware of Landes' adverse claim to the property. *See* Br. of App. at 21. Landes argues that Cuzdey had opportunity to bring this action for many years, but fails to explain when or how Cuzdey was supposed to have discovered that Landes no longer intended to follow through on their promise to deliver title. *See* Reply Br. of App. at 4-6. The first indication Cuzdey had that Landes was breaching the agreement by claiming full ownership of the property was when Cuzdey received an eviction notice after the divorce. CP 197. The eviction notice was served June 11, 2014 (CP 155); Cuzdey filed this action less than 60 days later, on August 1, 2014 (CP 1). Because Cuzdey did not unreasonably delay initiating this action, laches does not apply.

The trial court erred in holding that the doctrine of laches could be an alternate grounds for dismissal. The Court of Appeals declined to address the issue. This Court has discretion to consider the issue, but should decline to do so in the absence of a Court of Appeals decision to focus the issue and the parties' arguments.

3.5 Estoppel

The trial court cited estoppel as an alternative grounds for dismissal. The trial court based this comment on a misreading of Cuzdey's divorce order. *See* RP June 19, 2015,

at 65. Although the parties briefed the issue for the Court of Appeals, *e.g.*, Reply Br. of App. at 14-15, the Court of Appeals declined to address it. On the issue of estoppel, this Court does not have the benefit of the analysis of any lower court to focus the discussion.

Landes' estoppel argument relies on a misreading of Cuzdey's divorce petition and decree. *See* Reply Br. of App. at 14-15. Contrary to Landes' assertion, neither document states that Cuzdey owned no real property. *See* CP 308-314. Rather, the documents state "N/A" and "Does not apply," with reference to division of property *Id.* This is because Cuzdey and Wallen handled division of property on their own and did not seek the court's involvement in that issue. CP 82, 202. The divorce was uncontested, and the issue of property was never litigated or resolved by a court. *See* CP 202. Collateral estoppel does not apply.

The trial court erred in holding that estoppel could be an alternate grounds for dismissal. The Court of Appeals declined to address the issue. This Court has discretion to consider the issue, but should decline to do so in the absence of a Court of Appeals decision to focus the issue and the parties' arguments.

3.6 The Nova mobile home

The Court of Appeals correctly reversed the trial court's erroneous summary judgment dismissal of Cuzdey's claim to the Nova mobile home. Landes attempts to argue that her Second Amended Answer, which denied Cuzdey's claim, is somehow dispositive. Ans. to Petition at 18-19. Yet Landes herself stated on multiple occasions that she sold the Nova to Cuzdey and that Cuzdey had paid in full. This Court should decline her invitation to rewrite the past.

Landes made this admission in her declaration submitted with the original summary judgment motion²:

“Plaintiff and our daughter, Karla, were to pay us back for the loan by making the monthly payments, as well as the property taxes on the mobile home. ... Plaintiff and his wife paid the exact amount of each monthly loan payment. ... [T]he mobile home was paid off several years ago.”

CP 73.

Perhaps more strikingly, in the second amended memorandum in support of the motion for summary judgment, filed on the same day as the answer to the second amended complaint (*see* CP 397), Landes went to great lengths to show, as part of her Statement of Facts, that she and her husband had sold the Nova to Cuzdey and that Cuzdey had paid in full:

² The parties disagree as to whether this declaration has binding effect. *See* Reply Br. of App. at 21-22.

In 1985, Mr. and Mrs. Landes took out a loan with Seafirst Bank and purchased a larger, newer, Nova Commodore mobile home **for Mrs. Wallen and, her then husband, Mr. Cuzdey** to replace the older one. (Attachment 11, Washington State Vehicle Certification of Ownership [CP 469]; Attachment 12, Financial Loan [CP 471-74]; Attachment 13, Mobile Home (Nova Commodore) Installation Permit [CP 476]).

...

Mrs. Wallen and Mr. Cuzdey repaid Mr. and Mrs. Landes for the cost of the Nova Commodore by making the monthly payments on the loan for Nova Commodore mobile home directly to the bank. (Attachment 17, Check Signed by Karla Wallen (then Karla Cuzdey) [CP 485]; Attachment 18, Check Signed by Patrick Cuzdey, Indicating “loan” in the memo line [CP 487]). ... **The last payment made was in 2005 and the loan closed.**

...

The personal property taxes on the Nova Commodore mobile home (personal property number 99801439800) were paid at times by Mrs. Wallen and/or Mr. Cuzdey. Mrs. and Mrs. Landes [sic] paid them at times as well when the Mrs. Wallen and Mr. Cuzdey could not afford to, and Mrs. Wallen and/or Mr. Cuzdey would repay Mr. or Mrs. Landes. (Attachment 19, Thurston County Treasurer Receipts for Nova Personal Property Taxes [CP 489-98]; Attachment 20, Repayment Checks by Mr. Cuzdey [CP 500-01]).

CP 398-99 (underlines in original, bold emphasis added, citations to CP added for the Court’s convenience). The referenced attachments are documents that Landes submitted

with the second amended memorandum to support the narrative: that Landes agreed to sell the Nova to Cuzdey in return for Cuzdey making the monthly payments on Landes' loan and paying the property taxes, which Cuzdey did, paying in full by 2005.

Cuzdey also testified to this arrangement:

As Patricia Landes states in her motions for summary judgment, In 1985, the Landes took out a loan with Seafirst Bank and purchased the NOVA Commodore mobile home (the one at issue here) and the Landes agreed to sell it to us for the same price they paid, which was \$14,660.80 on the same installment terms. We moved into the NOVA and made monthly payments to the bank (not the Landes as she said) according to the agreement.

...

Patricia Landes states that the mobile home was paid off by me several years ago, which is true.

CP 191 (¶¶ 11 and 13). Cuzdey's declaration was signed on June 8, 2015, after the filing of Landes's second amended memorandum and her answer to the second amended complaint.

Jacob Cuzdey also testified, "Benny and Patricia signed for the loan on the NOVA and my father would pay that loan directly to the bank," and, "Benny and Patricia Landes considered my father's repayment of these loans complete given the value and extent of the work he performed and the cash that had been paid." CP 206.

The record is clear. Landes herself explained to the trial court that Landes and Cuzdey had an agreement to sell the Nova to Cuzdey and that Cuzdey had fully performed his obligations under the agreement. Cuzdey agreed. The facts that were presented to the trial court regarding the Nova were undisputed, and Cuzdey was entitled to judgment in his favor as a matter of law that he was the true owner of the Nova. The Court of Appeals was correct to reverse the trial court's erroneous dismissal of Cuzdey's claim to the Nova.

Landes cannot now change her story and rely on the denial in her answer to the second amended complaint. She presented the trial court with testimony and supporting documentary evidence that the Nova was paid for by Cuzdey in accordance with their agreement. Her attempt to backtrack and pretend that there was no such evidence is disingenuous at best, sanctionable at worst.

Additionally, Landes fails to demonstrate that this issue meets the criteria for review by this Court of the decision of the Court of Appeals. This portion of the Court of Appeals' decision does not conflict with any published precedent of the Court of Appeals or of this Court. It does not involve any constitutional questions. It is not a matter of public interest. It is nothing more than a conflict between the two parties. The Court of Appeals

correctly decided the issue. There is no reason for this Court to review it.

3.7 RCW 4.84.185

The Court of Appeals correctly decided that Cuzdey's action was not frivolous under RCW 4.84.185. A trial court may award attorneys' fees under RCW 4.84.185 only if the lawsuit was frivolous **in its entirety**, and advanced without reasonable cause. *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992). Even where only one claim of many is brought with reasonable cause, that is enough to defeat a request for fees. *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 787, 275 P.3d 339 (2012).

The Court of Appeals correctly found that Cuzdey's claim to the Nova was not barred and was brought with reasonable cause. As demonstrated above, Landes admitted that she sold the Nova to Cuzdey and that Cuzdey had paid off the loan. Cuzdey's claim to the Nova has merit. The Court of Appeals was correct to reverse and vacate the award of attorney's fees under RCW 4.84.185.

Additionally, Landes fails to demonstrate that this issue meets the criteria for review by this Court of the decision of the Court of Appeals. This portion of the Court of Appeals' decision does not conflict with any published precedent of the Court of Appeals or of this Court. It does not involve any constitutional

questions. It is not a matter of public interest. It is nothing more than a conflict between the two parties. The Court of Appeals correctly decided the issue. There is no reason for this Court to review it.

3.8 Attorney fees on appeal

The Court of Appeals correctly denied Landes' request for attorney's fees on appeal. The RAP and numerous published decisions require that a party requesting fees on appeal must devote a section of its brief to argument expanding on the grounds for the request. RAP 18.1; *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013). Landes' brief devoted nothing more than the following to her request:

Pursuant to RAP 18.1, 18.9, and RCW 4.84.185, Mrs. Landes requests to be awarded attorney fees and expenses for responding to this appeal.

Br. of Resp. at 50. Landes' argument that anything more than this "was completely unnecessary" is contrary to law. This Court has been "crystal clear" that a single sentence without argument is insufficient to support a request for fees on appeal.

Landes failed to set forth the standard for an award of fees for a frivolous appeal under RAP 18.9 (which is different from the standard for a frivolous action in the trial court under RCW 4.84.185) and failed to demonstrate how Cuzdey's appeal allegedly met that standard. Where Cuzdey obtained reversal on

two out of the three issues decided by the Court of Appeals, it cannot be said that Cuzdey's appeal had no reasonable chance of reversal. The Court of Appeals was correct to deny Landes' request for fees.

Additionally, Landes fails to demonstrate that this issue meets the criteria for review by this Court of the decision of the Court of Appeals. This portion of the Court of Appeals' decision does not conflict with any published precedent of the Court of Appeals or of this Court. It does not involve any constitutional questions. It is not a matter of public interest. It is nothing more than a conflict between the two parties. The Court of Appeals correctly decided the issue. There is no reason for this Court to review it.

4. Conclusion

This Court should accept review of the statute of frauds and part performance issue, reverse that portion of the decision of the Court of Appeals, and remand to the Court of Appeals to consider in the first instance the remaining issues relating to Cuzdey's claim to the real property. Until those issues are addressed by the Court of Appeals, they are not ripe for review by this Court. This Court should decline review of the new issues raised by Landes.

This Court should also decline review of those new issues that the Court of Appeals **did** decide. The Court of Appeals correctly reversed on the issues of the Nova mobile home and attorney's fees in the trial court and on appeal. None of these issues meets the criteria for review by this Court.

If the Court grants Cuzdey's petition, Cuzdey asks that the Court clearly identify the issues accepted for review, to enable the parties to appropriately focus their supplemental briefing.

Respectfully submitted this 31st day of July, 2017.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on July 31, 2017, I caused the foregoing document to be filed with the Court and served on counsel by the method indicated below:

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